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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. [redacted]95

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY ET AL., APPELLANTS,

vs.

THE SOUTHERN COTTON OIL COMPANY, APPELLEE.

STIPULATION AS TO MOTION TO DISMISS.

We agree that the respective motions to dismiss for want of jurisdiction and respective briefs in each of the cases No. 353, the Arkadelphia Milling Company, Appellant, *vs.* St. Louis Southwestern Railway Company and St. Louis, Iron Mountain & Southern Railway Company; No. 351, Joseph F. Hasty, Eliphalet F. Hasty, and William C. Hasty,

composing the partnership of J. F. Hasty & Sons, Appellants, *vs.* St. Louis Southwestern Railway Company and St. Louis, Iron Mountain & Southern Railway Company; and No. 355, St. Louis, Iron Mountain & Southern Railway Company *et al.*, Appellants, *vs.* The Southern Cotton Oil Company, shall be filed and considered by the Court as made in this case.

J. M. MOORE,
For Appellant.

J. F. LOUGHBOROUGH,
For Appellee.

[Endorsed:] File No. 25,678. Supreme Court U. S. October term, 1917. Term No. 356. St. Louis Southwestern Railway Co. et al., Appellants, *vs.* The Southern Cotton Oil Company. Stipulation that motions to dismiss in cases Nos. 353, 354 and 355 shall be filed and considered by the Court as made in this case. Filed April 11, 1918.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

THE ARKADELPHIA MILLING COMPANY

v. No. 92.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AND ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

JOSEPH F. HASTY, ELIPHALET F. HASTY, AND WILLIAM C. HASTY, COMPOSING THE PARTNERSHIP OF J. F. HASTY & SONS, APPELLANTS,

v. No. 93.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AND ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *et al.*, APPELLANTS,

v. No. 94.

THE SOUTHERN COTTON OIL COMPANY.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *et al.*, APPELLANTS,

v. No. 95.

THE SOUTHERN COTTON OIL COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE EASTERN DISTRICT OF ARKANSAS.

BRIEF ON BEHALF OF THE
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY

AND

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

STATEMENT.

On June 15, 1908, the Railroad Commission of the State of Arkansas promulgated Standard Freight Distance Tariff No. 3, prescribing maximum rates on all classes and commodities of intrastate freight on all railroads operated in the state. On July 18, 1908, the St.

Louis, Iron Mountain & Southern Railway Company and the St. Louis Southwestern Railway Company, respectively, brought suit in the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas to enjoin said rates on the ground that they were confiscatory. Temporary injunctions were granted in both cases on September 3, 1908, and an injunction bond in the sum of $200,000 was filed with the United States Fidelity & Guaranty Company as surety, in each case. Copies of the order of injunction and bond in each case are printed at pages 6 and 7 of the record. A further bond in the sum of $500,000 on the part of the St. Louis, Iron Mountain & Southern Railway Company, and the sum of $300,000 by the St. Louis Southwestern Railway Company, without sureties, was filed under orders of June 23, 1909 (Rec. 9, 10). On May 11, 1911, a final decree was entered in each case sustaining the allegations of the bill and perpetually enjoining the enforcement of the commission's rates (Rec. 11, 12). Each of the decrees contained the following order: "It is further ordered that the bond for injunction filed by the complainant herein be released and the sureties thereon discharged from liability" (Rec. 12). Appeals were taken from these decrees to the Supreme Court. The cases were heard together and the decrees of the Circuit Court reversed on the 16th day of June, 1913. (See Allen v. St. Louis, Iron

Mountain & So. Ry. Co., 230 U. S. 553.) Mandates from the Supreme Court were filed in the District Court on July 18, 1913, and on the same day a decree was entered in each case, in obedience to the mandate, dismissing the case without prejudice, and appointing a special master to state an account of damages sustained by the granting of the temporary and permanent injunctions. The decree directed the master to report separately all claims which arose under the first temporary injunction granted by Circuit Judge Van Devanter (covering the period between the 3d day of September, 1908, and July 5, 1909), all claims that arose under the bonds executed in pursuance of the order made by the District Judge (covering the period from September 5, 1909, to May 11, 1911), and all that arose after the rendition of the final decree on May 11, 1911 (Rec. 12-15).

On December 21, 1914, the special master filed his report in each case, showing in detail the claims filed, those allowed and those disallowed during the three separate periods directed by the decree, in three series, designated as A, B and C. A and B apply to all claims that accrued prior to the entering of the final decree, and those in Series C to all that accrued after the final decree was entered.

It is unnecessary to distinguish between Series A and B, as they cover practically the same class of

claims, all of them having accrued while the temporary injunctions and injunction bonds were in force, but they are distinguishable from Series C in that the latter accrued subsequent to the final decree, and after the injunction bonds had ceased to be effective.

The following claims were allowed by the special master, namely:

Southern Cotton Oil Company

Against St. Louis, Iron Mountain & Southern Railway Company:

Series A and B	$19,072.30
Series C	13,000.63

Against St. Louis Southwestern Railway Company:

Series A and B	$2,551.53
Series C	2,210.64

J. F. Hasty & Sons

Against St. Louis, Iron Mountain & Southern Railway Company:

Series A and B	$7,077.21
Series C	9,259.12

Against St. Louis Southwestern Railway Company:

Series A and B	$ 696.39
Series C	384.02

Arkadelphia Milling Company

Against St. Louis, Iron Mountain & Southern Railway Company:

Series A and B	$7,644.96
Series C	2,175.46

Said allowances were based on the difference between the rates collected while the injunction was in force and those provided in the commission tariff (Rec. 15-17).

The court at the hearing of said causes by consent of all the parties ordered that all of the claims be consolidated for trial on any appeal that might be taken, and it was stipulated by counsel that one transcript might be made by the clerk in all the cases (Rec. 2, 48).

WE WILL FIRST TAKE UP THE TWO LATER NUMBERED CASES (NOS. 94 AND 95), INVOLVING APPEALS BY THE RAILWAY AND GUARANTY COMPANIES FROM THE DECREES IN FAVOR OF THE SOUTHERN COTTON OIL COMPANY.

On the coming in of the master's report the following exceptions were filed by each of the plaintiffs (Railroad Companies) to the allowance of the claim of the Southern Cotton Oil Company, namely:

Exception No. 1. Because in the final decree entered in said cause on the 11th day of May, 1911, it was ordered and decreed that the injunction bond filed by complainant in said cause be discharged and the makers thereof released from liability, the effect of which order was to relieve complainant and the sureties on said bond from all liability by reason of the granting of said preliminary injunction, as well as by reason of the final decree entered in said cause perpetuating said injunction.

Exception No. 2. As to all such claims for overcharges as accrued subsequent to the date that the final decree in said cause was entered, viz., the 11th day of May, 1911, which are embraced in the class of claims designated by the special master as Series C, and to the finding and allowance made by the special master

in connection with said claims, complainant excepts on the ground that at and after the rendition of the final decree in said cause the injunction bonds filed by complainant ceased to be operative, or to create any further liability on the part of the complainant or the sureties therein, and complainant incurred no liability to said claimants or any of them under said final decree perpetuating said injunction, the same having been based on a final hearing and determination by the court of the issues involved in said cause, constituted a final adjudication thereof.

The exceptions in each case were overruled and judgment rendered in favor of the claimants against the complainant and the United States Fidelity & Guaranty Company, the surety on the injunction bonds (Rec. 16, 3).

The plaintiffs and the guaranty company filed their prayers for appeal and assignments of errors (Rec. 39, 43).

The following errors were assigned in each case:

First. The court erred in overruling plaintiff's exceptions and sustaining the allowance made by the master.

Second. In rendering judgment in favor of the Southern Cotton Oil Company.

Third. In holding that the final decree entered in the original case did not release the injunction bonds filed in said case, and discharge the plaintiff and the surety on the injunction bond from liability on said bonds by reason of the granting of the preliminary injunction.

Fourth. In overruling plaintiff's Exception No. 1.

Fifth. In overruling plaintiff's exception to all such claims as accrued subsequent to the date of the final decree in the original case, entered the 11th day of May, 1911, which claims are embraced in Series C, and in not holding that the injunction bonds filed by the plaintiff ceased to be operative, or to impose any liability on the plaintiff or the surety therein, after the rendition of the final decree perpetuating the injunction.

Sixth. In overruling Exception No. 2 filed by the plaintiff to the allowance of said claim.

Seventh. In allowing and entering judgment for interest on said claims prior to the findings by the master.

Eighth. In allowing and rendering judgment for interest on any of said claims prior to the date at which the judgment in this proceeding was rendered.

Ninth. In awarding costs in the respective interventions against the plaintiff (Rec. 39, 43).

ARGUMENT FOR APPELLANTS, RAILWAY AND GUARANTY COMPANIES.

These proceedings are founded on the injunction bonds. The order of reference recited that it was made under Rule 15 of the District Court. The following is a copy of the rule:

"In all cases in which an injunction has been granted, and a bond executed by the complainants, damages sustained by the party enjoined, in case the injunction is dissolved, may be assessed in the same proceeding, either by the court or by reference to a master, and judgment entered in the same action against the sureties on the bond; provided, however, that unless the damages are thus assessed in the cause, or a judgment entered that the party enjoined is entitled to no damages by reason of the improper granting of the injunction, he may proceed on the bond in an action at law without any further order or leave of the court" (Rec. 25-6).

The rule relates alone to damages recoverable on injunction bonds, and they are the only foundation for the decrees rendered against the United States Fidelity & Guaranty Company, the surety on the bonds.

I.

The bonds given for the temporary injunction became inoperative at the time of the entering of the final decree, making the injunction permanent, May 11, 1911, and no damage accruing after that date was recoverable on the bonds.

This covers all the claims included in Series C of the master's reports.

Houghton v. Meyer, 208 U. S. 149.

St. L., I. M. & S. Ry. Co. v. McKnight, 244 U. S. 368, 374.

In the case last cited, this court, referring to the final decrees in these cases, said:

"Damages arising between May 11, 1911 (the date of the decree granting the permanent injunction) and July 18, 1913 (the date of the decree on mandate dismissing the bill) were not recoverable on the injunction bond," citing Houghton v. Meyers, *supra*.

II.

Claims reported under Series A and B accrued while the temporary injunctions were in force. We contend that under the provisions of the decree of May 11, 1911, the bonds were released. The decrees respectively provided: "It is further ordered that the bond for injunction filed by the complainant herein be re-

leased and the surety thereon discharged from liability." The ruling in St. L., I. M. & So. Ry. v. McKnight, *supra,* does not sustain the contention that the order was inoperative as to liability on the bond. In that case the right of the shipper to sue at common law was involved, and it was held that the common law right to sue was not destroyed by the injunctions, but simply suspended. The suit was brought to restrain the defendants from prosecuting independent actions at law on the ground that the District Court, having taken jurisdiction for the purpose of assessing damages growing out of the granting of the injunction, its jurisdiction was exclusive, and the only remedy of the shippers was by filing their claims before the master. The court at page 374 of the opinion said:

"* * * The decree of May 11, 1911, expressly released the Railway Company and sureties from further liability on the bonds. It is contended by the Railway Company that the effect of the decree entered by the District Court is to deprive shippers and travelers of all remedy under the bond. But Gallup makes no claim under the bond. He sues on causes of action to recover overcharges arising under the Arkansas statutes. Gallup did not in fact become a party to the suit in the District Court; and he could not, after the mandate directed dismissal of the bill, be compelled to submit to that court the adjudication of his claim."

In the cases at bar the claims were made under the bonds, and raise the question as to the effect of the order on the liability created by the bonds.

The power of the court to release the bond, or other security, given as a condition of the issuance of a temporary injunction, was discussed at some length by Justice Bradley in *Russell* v. *Farley*, 105 U. S. 433. The court held that where no security is required the court has no power to award damages sustained in consequence of the injunction, except by making such a decree with reference to the costs of the suit as it may deem just. That to prevent any injustice that might result from the improvident issuance of an injunction the court may in the exercise of its discretion impose as a condition upon the plaintiff that it file a bond, make a deposit or provide other security for the plaintiff's protection. That since the imposition of terms is within the discretion of the court it follows that it has the further power to mitigate, or relieve altogether from, the terms imposed; that the power to impose the condition implies the power to relieve against it, and if it appear that the suit was brought in good faith it is within the discretion of the court to release the security.

In that case the appeal was from a decree that the appellant was not entitled to damages; and, in response to appellant's contention that if the lower court had the

power to remit damages its decision was erroneous, this court held that the judgment approached so near to an exercise of discretion that it would require a very clear case to induce the court to reverse its judgment. (P. 446.)

In Houghton v. Meyer, 208 U. S. 149, this court affirmed the judgment of the Court of Appeals of the District of Columbia reversing the judgment of the District Supreme Court refusing to assess damages on the injunction bond, on the ground that there was no doubt as to the rights of the parties, and distinguished the case in that respect from Russell v. Farley. It is not necessary to review the facts upon which the court based its conclusions in those cases as the court is doubtless familiar with them. The view taken in both the cases was that where a proceeding was prosecuted in good faith and the rights of the parties left in doubt it was open to the court that granted the injunction to exercise its discretion in relieving the party obtaining the injunction from damages.

The record in this case shows that the rights of the parties was left in doubt at the end of the litigation. The decree of the lower court was not reversed on the ground that the rates complained of were found to be reasonable and the allegations of the bill untrue. This court held that the mode of proof adopted was erroneous and directed that the case be dismissed with-

out prejudice, thus leaving the question open, to be relitigated if claimants should elect to do so. The record also shows that the lower court, during the progress of the case investigated the rates prescribed in the Commission Tariff and those put in by the railroad companies after the commission's rates had been enjoined, on motion to modify the temporary injunction, on the ground that plaintiff had put in unreasonable rates. A large amount of evidence was taken in regard to the reasonableness of the rates, involving the Commission Tariff as well as the voluntary tariff of the railroads, and an order was entered authorizing the railroad companies to charge freight rates that would produce a net increase of 33⅓ per cent on the revenues produced by the Commission Tariff, which rate was put in force on the 7th day of June, 1909, and continued until the final dissolution of the injunction (Rec. 8, 9). In view of the investigation and order made by the court during the pendency of the suit, of the final decree sustaining the allegations of the bill, and of the order of this court directing that the case be dismissed without prejudice, we submit that it can not be said that the result of the litigation left no doubt as to the rights of the parties or the right of defendants to avail themselves of the security given by the railroad company.

Referring again to the case of *Houghton* v. *Meyers*, which is relied on by appellees on this proposition, the case was before the Court of Appeals of the District of Columbia and this court twice. It was heard and decided on its merits, and this court said in concluding the opinion disapproving the judgment of the Supreme Court of the District refusing to enforce the injunction bond, that the result of the litigation left *no doubt* as to the rights of the parties, and of the government to avail itself of the bond, and for that reason held there was no room for the application of the doctrine laid down in Russell v. Farley. In the cases now before the court there was never a hearing on the merits or a determination of the rights of the parties.

The condition of the bonds in these cases was that if it should be eventually decided that the order inhibiting the enforcement of the commission rates should not have been made the complainant would refund, etc. That eventuality never arose. On the contrary, the decision of the trial court on the interlocutory proceeding in which the rates were investigated, and in the final decree rendered by the District Court, constituted a finding that the injunction was properly issued and the mere fact of the dissolution of the injunction and dismissal of the bill without prejudice pursuant to the mandate of this court was not a decision that the in-

junction should not have been granted. This court did not go into the details of the evidence or express an opinion as to the merits of the case, and obviously directed the lower court to dismiss the bills without prejudice for the purpose of leaving the questions involved open and undisposed of.

In the cases of N. C. & St. L. R. R. Co. v. Railroad Commission, 171 Fed. 223, and So. Ry. Co. v. Railroad Commission, 196 Fed. 558, in which the bonds were conditioned that in case the injunction was wrongfully issued complainants should pay all damages, etc., the District Court held that although the litigation was abandoned, the injunction was not dissolved as wrongfully issued, or on the ground that the rates should not have been enjoined, and that by the terms of the bond no liability could arise until the happening of one of these events.

It is stated in I Spelling on Injunctions and other Extraordinary Remedies, section 956, that:

"If an injunction is properly granted, no damages can be recovered by the party enjoined, although the suit was afterwards discontinued by the plaintiff, or although the Court of Appeals decided the suit against the plaintiff."

In New York, West Shore, etc., R. Co. v. Omorod, 29 Hun 274, the court said:

"It appears from the papers before us that the proceedings by which the plaintiff acquired the title to the lands were reversed by the Court of Appeals, but that is by no means a determination that the plaintiff was not entitled to the injunction at the time it was issued. (Methodist Churches v. Barker, 18 N. Y. 465). Such reversal may have been for irregularities without affecting the merits. It does not appear to us it was not so, and the burden rested upon the defendant to show it. No damage can be awarded or assessed unless the court finally decides that the plaintiff was not entitled to the injunction at the time it was issued. (Benedict v. Benedict, 15 Hun. 306; Weeks v. Southwick, 12 How. 170; Shearman v. New York Central Mills, 11 How. 269; Palmer v. Farley, 71 N. Y. 106)."

And in Hall v. Sexton, 3 N. Y. S. 549, the Superior Court of New York City, in rejecting a claim for damages in a case in which it appeared that after the trial court had affirmed an order of injunction the plaintiff had discontinued his action, said that the defendant was not entitled to damages in the absence of a determination by the court that the plaintiff was not entitled to the injunction at the time it was issued, and closed its opinion with these words: "It is not enough that the plaintiff has discontinued the action."

The decrees of the District Court specifically vacated the bonds and discharged the sureties. The parts of the decrees vacating the bonds and releasing the sureties were not appealed from. No error was assigned on that ground in connection with the prayers for appeal (Rec. in Main case, vol. 3, p. 2650), and the action of the court was not presented or passed on by this court. The rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided, and the court will consult the records and the opinion delivered by it at the time of entering its judgment to ascertain what was decided.

Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 552.

In re Sanford Fork & Tool Co., 160 U. S. 247, 256, 258.

Gaines v. Rudd, 148 U. S. 228, 240.

In re Potts, 166 U. S. 263, 266.

The fact that the District Court mistakenly assumed upon the remanding of these cases that it was its duty to ascertain and assess damages does not strengthen appellee's position. That court had no jurisdiction or authority to order an assessment of damages at that time. The matter had passed beyond its control.

APPEALS OF ARKADELPHIA MILLING COMPANY, NO. 92, AND OF J. F. HASTY & SONS, NO. 93.

The claims of the appellants and allowances made by the master were based on the difference between the rates charged while the injunction was in force, and the rates provided in the Commission Tariff on the movement of rough material from the woods into milling points.

The railroad companies respectively excepted to the allowance by the master in favor of J. F. Hasty & Sons on the ground that the movement of rough material into the milling point, and the subsequent forwarding of the finished product to points out of the State of Arkansas constituted interstate commerce, and the rough material rates prescribed by the State Tariff were not applicable. This exception was not made and did not apply to the claim of the Arkadelphia Milling Company.

Each of the railroad companies excepted to the allowance in favor of each appellant on the ground that the provisions of the commission tariff regulating rough material rates into milling points were in the alternative, and were discriminatory against shippers who did not enter into contracts with the carrier for the

reshipment of certain specified percentages of the finished product.

The court sustained the appellees' exceptions on both grounds and disallowed appellants' claims, from which ruling these appeals are prosecuted.

The shipments on which said claims are based were bolts, staves, headings and rough lumber from the woods to the mills of the respective appellants (Rec. 23).

The maximum rates on lumber and stave bolts are contained in Item No. 40 (Rec. 19, 20). The maximum rates on staves and headings appear in Item 41 (Rec. 22-3).

Item 79 of the tariff designated "Rough Material Rates," printed at page 17 of the record, prescribes lower rates on all the commodities referred to than those contained in Items 40 and 41, conditioned upon the finished produce being reshipped over the same lines in certain proportions set out in the following paragraphs which follow the table of rates in Item 79:

"b. The above named rates are conditional upon the manufactured product being reshipped over the same line bringing in the rough material, and may be only used subject to the following conditions: The proportion of the tonnage of outbound manufactured

product to the tonnage of in-bound rough material shall not be less than the following'' (here follows the table of percents).

''c. The rates named above are intended to be used as rough material rates only, and carriers will be allowed by the commission to require consignees desiring to avail themselves of the benefit of same to enter into a suitable contract with reference to the reshipment of the specified percentage of the finished product; provided, the terms of said contract must be satisfactory to and approved by the commission; provided, further, that in no case shall the contract provide a higher rate on in-bound shipments than outlined in the above table'' (Rec. 17, 18).

Following, on page 18, the record contains these statements:

''That the aforesaid claimants (appellants) shipped over the line of railroad that brought in the rough material the requisite percentages of manufactured product named in said item 79 of the said tariff, in the usual course of business as hereinafter described.

''That said tariff also carried other schedules of rates applicable to the movement of the same commodities as those covered by the above claims where there was to be no reshipment of the in-bound rough material in its finished state from the mill, said rates being

known as the flat or local rates and are covered by Items 40 and 41, which are as follows.''

The following statement taken from the record shows how rough material was moved and handled from the woods into milling points and converted into finished product and shipped to markets out of the state:

''In the woods, trees would be cut down and sawed into lengths, and these lengths would be split into quarters or a less fraction of the piece. 'Bolts' were the parts into which a length or cut was split, from which several barrel staves, or pieces of barrel heading or hoops could be made; 'rough staves' or 'rough heading' were pieces of the size from which but one stave or piece of heading could be made. Some of the shippers whose claims are involved manufactured their rough material only into staves, some only into headings or hoops and some into more than one of such parts. When the rough material reached the mills, it was manufactured into finished staves, headings and hoops, and in this condition shipped to whoever purchased them. The purchaser uses them in making barrels, casks, etc. The wastings in the finishing of said articles from the rough material were either disposed of for firewood, or destroyed. When the rough material left the woods, a bill of lading was issued from

the woods to the mill. When the rough material reached the mill, it was finished into some or all of the articles described, when it was stacked in the yards or placed in kilns to dry. The process of manufacturing and drying occupied several months, or on an average this process would be gone through with, the finished products sold and shipped to the purchaser in about five months from the date the rough material was received at the mill. The claimants classified the different parts after they came from the mill completely finished and made sales from such stock. The markets for the manufactured articles were almost altogether in other states than Arkansas, or in foreign countries, and about 95 per cent of the sales of finished articles, that is, of the total out-bound shipments, were made for delivery at points outside the State of Arkansas, the remaining 5 per cent being sold and delivered, or shipped to points within the State of Arkansas. At the time the rough material was shipped to the mills, the mills did not know to whom they would sell the finished product, or to what points it would be shipped, but did know that there was little market for the finished articles in the State of Arkansas, and expected that they would sell 95 per cent of the said finished articles and ship them to points outside of the State of Arkansas.

"It was the intention of all the claimants herein at the time they shipped the rough material into the

milling points to mill said rough material with the object of selling the said finished product and shipping it out as soon as practical and all of them knew and intended at the time they brought the rough materials into the mill on account of previous course of dealings in the business, that 95 per cent of the finished product would be by them shipped to points outside the State of Arkansas.

"The claimants paid the usual property tax to the State of Arkansas on their stock of materials on hand at the milling point, whether said stock was in the rough or finished, the amount of the tax being arrived at according to the methods in use in the State of Arkansas by the use of an average basis.

"The rates charged on the rough material from the woods to the mill while Standard Distance Tariff No. 3 was suspended by the injunction herein were lower than the local rates named in that tariff, but were greater than the rough material rates named in that tariff.

"On the shipment of the out-bound product from the mill to its destination the freight rates charged were the regular rates in force at the time on these commodities between the points of shipment and the shipments were forwarded on the ordinary waybills between these points.

"As to the part of the claim of the Arkadelphia Milling Company that was based on rough lumber shipped to their mill, the rough lumber was manufactured into dressed lumber, stored in their yards, and later sold and shipped to whoever purchased it, in the same manner as was done with bolts and staves in the stave business as hereinbefore described, and with the same intention, except that a much larger per cent of the dressed or finished lumber was sold and shipped to points within the State of Arkansas.

"The rough material rates per 100 pounds established in Distance Tariff No. 3, from the woods to the mill, plus the rate per 100 pounds on the manufactured article from the mill to its destination, were substantially more than the through rates would be on a shipment of the same manufactured articles from the woods to final destination on a continuous movement; if the rough material had been shipped from the woods to final destination of the finished product the cost of transportation would have been much greater, because of the greater weight and bulk of the rough material."

Since about the year 1898 similar rough material tariffs have been in force in Arkansas."

The rates charged appellants on the rough material from the woods to the mill were lower than the maximum local rates contained in the commission tariff,

but greater than the rough material rates in said tariff. And it is for this difference that the claims for refunds are made by appellants.

ARGUMENT FOR APPELLEES (RAILWAY COMPANIES).

The following announcement made orally by the court from the bench at the time these interventions were disposed of state the questions, and the grounds upon which the court placed its rulings, so clearly that we can not do better than to insert it as a part of our argument. The court said:

This question was before this court in St. Louis Southwestern Railroad Company against the State Board of Railroad Commissioners of the State of Arkansas, in a proceeding to enjoin the commission from enforcing this rule. That case, which was an application for a temporary injunction against the State Board of Railroad Commissioners, was heard by three judges, Hon. Walter I. Smith, Circuit Judge; Hon. F. A. Youmans, District Judge for the Western District of Arkansas, and the Judge of this Court. In that case, after careful consideration, the three judges reached the unanimous conclusion that this order of the commission Item 79, is absolutely void for the reason that it is unconstitutional, upon two grounds. The first ground is that it discriminates between those shippers who reship their material on the road which brought the rough material to the mill, and those who do not reship, and, therefore, is void in view of the decision of the Supreme Court in the Lake Shore & Michigan Southern Railroad Company v. Smith, 173 U. S. 684. The small manufacturers of lumber who only manufactured for the local demand and shipped none of the material out received no rebate. Cotting v. Kansas City Stock

Yards Company, 183 U. S. 79. The other ground upon which we declared it unconstitutional was that it appeared in that case, as it appears now in this case by the agreed facts, that 92 per cent of this rough material after being manufactured into lumber or staves, was shipped out of the state; that the rough material manufactured into staves was practically all shipped out of the state because there are so few cooperage companies which buy the manufactured staves in the State of Arkansas that there is practically no market, and that this fact was known to the manufacturers at the time they had the logs, or rough material, hauled to the mill. The lumber manufactured by these lumber mills is so much greater than it is possible can be used in the State of Arkansas, that it was well known at that time that over 90 per cent of it would have to be shipped out of the state and only the remaining portion could be sold in the state. The order of the commission makes no distinction between the manufactured articles which are to be shipped out of the state and those which are to be shipped to other places in the state. If the Supreme Court of the State of Arkansas, in construing this order, had construed it to apply only to intrastate shipments, that would have been conclusive in this court that the order of the commission applies only to intrastate, but the Supreme Court of this state, in construing this order in Chapman-Dewey Lumber Company v. Jonesboro, Lake City & Eastern Railroad Company, 97 Ark. 300, held that the order applies just as much to the manufactured product which was shipped out of the state as to that which was shipped to places in the state. The order is, therefore, not separable and must be by this court held to apply to interstate as well as intrastate shipments. In view of the decision of the Supreme Court of the United States in the Trade Mark cases, 100 U. S. 92, Illinois Central Railway Company v. McKendrie, 203 U. S. 514, Employers' Liability cases, 207 U. S. 463, such an order is a burden upon interstate commerce, and, for that reason, void. Upon these two grounds the court holds that the exceptions are well taken and should be

sustained. In view of the ruling of the court on the first exception, it is unnecessary to pass upon the other exceptions mentioned.

I. THE ROUGH MATERIAL RATES ARE VOID ON THE GROUND OF DISCRIMINATION.

The case of *Lake Shore & Michigan Railway Company* v. *Smith*, 173 U. S. 684, cited by the District Court, related to a statute of Michigan providing that railroads should keep on sale thousand-mile nontransferable tickets and sell them at less than the maximum rates prescribed by the state law. The court held that the power to enact general laws regulating charges on railroads did not include the power to compel a railroad company to make an exception of some particular class in the community, and to serve that class at less than it had the right to charge others. The Legislature having fixed a maximum rate, the company has the right to insist that all persons shall be compelled to pay alike.

It was contended that the power to impose reduced rates existed on the ground of public convenience. The court refused to entertain the contention and said at page 698:

"It is not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the person spoken of, who in the

legislative judgment, should be carried at a less expense than the other members of the community. There is no reasonable ground upon which the legislation can be rested unless the simple decision of the Legislature should be held to constitute such reason."

It distinguishes the case of *Lake Shore, etc.*, v. *Ohio,* 173 U. S. 285, where the court sustained the validity of a statute of Ohio requiring railroad companies carrying regular passenger trains to stop at stations containing over three thousand inhabitants for time sufficient to let off passengers, because the enactment subserved the public convenience, and on the ground that "the power of the state by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, public morals or the public safety."

In *Pennsylvania Railroad Company* v. *Towers,* 245 U. S. 6, the power of the State Public Service Commission of New York to establish special and reduced rates applicable to commutation tickets came before the court, and the validity of the order of the commission was sustained on the ground that it applied to a particular service, different from that generally rendered by railroads to the public, and to passengers who sustained a peculiar relation to the service, was for the

convenience of the public, and therefore within the police power. Distinguishing the case in those respects from the Lake Shore case cited above, the court cited with approval the ruling of the appellate division of the Supreme Court of New York from which the case was removed by writ of error. That court held that the ruling in the Smith case was based on the ground that the reduced rate prescribed for mileage tickets under the Michigan statute "was not for the convenience of the public and thus within the police power but for the convenience of certain individuals who were permitted to travel upon the railroads for less than the reasonable rate prescribed by law." Other cases distinguishable on the ground that they involved public convenience are cited, and a quotation by this court from the opinion of the state court ends with the following language:

"We conclude that the statute in question is valid as conferring power on the commission to regulate rates for the *public convenience and welfare*" (p. 15).

The court also cited the ruling of the Interstate Commerce Commission in the Commutation Rate Case, 21 I. C. C. 428, where it was held that commutation tickets were very essentially different in character from mileage tickets, in that the former were important to many suburban communities near large cities, the

growth and prosperity of which largely depended on reasonable and efficient commutation service, and involved the public convenience and welfare.

The line of distinction drawn in all these cases, and upon which the validity of this character of legislation is to be determined, is whether the object of the legislation, or the regulation, is the promotion of the convenience and welfare of the public. When that is not the case and the discrimination is for the benefit of some particular class in the community without any reasonable basis therefor, the power is wanting and the discrimination is illegal.

The rule established by the cases as we understand them is expressed by the following language taken from the Lake Shore case at page 692:

"The power of the Legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in a community and to carry the members of that class at a less sum than it has the right to charge those who are not fortunate enough to be members thereof. This is not reasonable regulation."

And again at page 695:

"The Legislature can not enact a law making maximum rates and then proceed to make exceptions to it

in favor of such persons or classes as in the legislative judgment or caprice may seem proper."

And at page 694, referring to maximum freight rates, the court said:

"If this power exists it must include the right of the Legislature, after establishing maximum freight rates, to also direct the company to charge less for carrying freight where the party offering it sends a certain amount, and to carry it at that rate for the next two or five or ten years. Is that an exercise of the power to establish maximum freight rates? Is it a valid exercise of the power to regulate the affairs of a corporation? The Legislature would thus permit not only discrimination in favor of the larger freighter as against the smaller one, but it would compel it."

In the case of *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, the same principle was invoked and sustained. The court held that classification of stockyards made by the statute of Kansas was based solely on the amount of business done and without any reference to the character and value of the service rendered, and at page 112 said:

"This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the charac-

ter of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

The exception in the tariff under consideration is not based on any benefit to the public, or any difference in the service rendered shippers, and its effect is to favor large manufacturers and shippers who are in position to market the product of their mills in other states and foreign countries.

II. THE ORDER OF THE RAILROAD COMMISSION AS CONSTRUED BY THE STATE IN CHAPMAN DEWEY LUMBER COMPANY V. J. L. C. & E. RY. CO., 97 ARK. 300, APPLIES TO INTERSTATE SHIPMENTS AND IS VOID.

The Supreme Court of Arkansas held that the Rough Material Rates apply to all shipments without regard to whether the place of ultimate destination was within or without the state, and apply as well to the manufactured product which was shipped out of the state as to that which was shipped to places within the state.

The rough material rates are conditioned on the reshipment of the manufactured product over the same

line by which it moved into the milling point, and the order of the commission provided that the railroads might require shippers to enter into contracts for reshipment of the finished product. The evidence shows that there was little market in the state for the finished product and that 95 per cent of it was shipped to other states; that it was the intention of all the claimants (whose claims were filed before the master) "at the time they shipped the rough material into milling points to mill said rough material with the object of selling said finished product and shipping it as soon as practicable, and all of them knew and intended at the time they brought the rough material into the mill on account of the previous course of dealings in the business that 95 per cent of the finished product would be by them shipped to points outside of the state of Arkansas."

When the rough material was delivered to the railroad a bill of lading was issued from the point of delivery to the mill. When it reached the mill it was finished into merchantable articles and stacked in the yards, or placed in dry kilns. The process of manufacturing and drying occupied several months. The average time between the delivery of the rough material at the mill and the preparation and shipment of the finished product was about five months. The different articles manufactured from the rough material

were classified as they came from the mill in their finished state and sales made from such stock. At the time the rough material was shipped to the mills the owners did not know to whom they would sell the finished product, but did know from the course of the business that 95 per cent of the finished product was destined to points outside of the state of Arkansas. The object of the order was to confer on shippers milling in transit privileges and it is obvious that practically all the shipments that were within the order of the commission would be interstate in character, as the transportation would not be completely performed until the shipments had reached their ultimate destination, under the arrangement for reshipping from the mills.

In the Trademark cases referred to by the District Court it was held that where Congress enacts a law which can only be valid as a regulation of commerce it is expected that it will on the face of the law, or from its essential nature, be limited to commerce with foreign nations or among the states or with the Indian tribes, and if not so limited it is in excess of the power of Congress. 100 *U. S.* 96. This ruling applies to the order of the Railroad Commission. It further held that such an act was not separable, and that it was not within the power of the courts to give the words used by Congress a narrower meaning than they were mani-

festly intended to bear. As construed by the Supreme Court of the state, the order of the Railroad Commission was intended to cover all shipments of rough material without regard to the destination of the material in its finished form whether within or without the state. The court further said that the proposed limitation can not be obtained by striking out or disregarding words, but only by inserting language that was not within the statute, and if the court should undertake by judicial construction to make a law which Congress did not make it is probable it would do what, if the matter were before it, that body would be unwilling to do, namely, make a trademark law which is only partial in its operation. The same may be said with equal force in regard to the order of the Railroad Commission.

U. S. v. Reece, 92 U. S. 214.

Employers Liability Case, 207 U. S. 463.

Illinois Central v. McKendrie, 203 U. S. 514.

The controlling principle in cases of this character is set out in Texas & N. O. Ry. Co. v. Sabine Tram Co., 227 U. S. 111, in which the former decisions of the court are reviewed, and it was held that the essential character of the shipment must be regarded. It was contended in that case that when lumber left Ruliff, where the shipment originated, it was not started on its journey to Europe. The character of the shipment did not

contemplate or provide that it should go beyond Sabine "through the agency of that shipment." Conceding that there must be continuity of movement to a foreign destination, the court held that the principle was not defeated by the fact that the shipment was not made on through bills of lading. Referring to Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U. S. 498, the court said it was contended in that case that the transit of the cake and meal ended at Galveston, but that the contention was rejected, the court holding that the doctrine of Coe v. Erroll, 116 U. S. 517, was not defeated by the fact that the routing of the freight ended at Galveston, that being the final point of concentration, the cake being there manufactured and sacked for export, just as in these cases the mill was the point of concentration where the rough material was to be manufactured and prepared for shipment. The principles of law upon which the case turned are summed up on page 126 as follows:

"The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps

in its transportation would be extremely artificial. Once admit the principle and means will be afforded for evading the national control of foreign commerce from points in the interior of a state. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading the commerce will be given local character, though it be essentially foreign."

Continuing the court said: "That it is the nature of the traffic and not its accidents which determine its character is illustrated by Ohio Railroad Commission v. Worthington, 225 U. S. 101." In that case a certain class of coal was transported on bills of lading to a point on Lake Erie, where it was accumulated in large quantities and only taken out of the accumulated lots from time to time for the purpose of shipment out of the state; it was not known to what particular destination the coal would be ultimately shipped. Small quantities were at times unloaded on one of the islands in the State of Ohio, but no importance was attached to that fact. The important point the court said at page 110, referring to the case of Southern Pacific Terminal Company, was that the shipments were destined for export, and the case therefore came under the ruling in Coe v. Erroll, *supra*, where it was said that goods are in interstate, and necessarily as well in foreign commerce, when they have "actually started in the course

of transportation to another state, or are delivered to a carrier for transportation." In Sabine Tram case the court distinguished the case of Gulf, Col. & S. F. Ry. Co. v. Texas, 204 U. S. 403. In that case corn, which was the subject of the shipment, was purchased by Hardin Grain Company from Harroun Commission Company to be delivered at Texarkana, Texas. The commission company shipped the corn from South Dakota to Texarkana and delivered it to the Hardin Grain Company at that place. The latter company shipped the corn in the same cars in which it was brought to Texarkana to Goldthwaith, Texas, to fill an order for corn it had sold parties at that place. The court held the corn did not come into the control of the Hardin company until it was delivered to them at Texarkana; that there was no connection between the transportation of the corn from South Dakota to Texarkana, and from the latter point to Goldthwaith, the one having ended and served its purpose before the other commenced; that these were the determining facts, and the history of the corn prior to its arrival at Texarkana was put aside as irrelevant and the controlling fact decided to be that the contract between the Hardin Grain Company and the Harround Commission Company was completed in accordance with its terms when the corn was delivered to the Hardin company at Texarkana and

that company did not acquire title and control of it until the first contract of transportation had been completed.

Swift & Co. v. U. S., 196 U. S. 375, 298.

Penn. Ry. Co. v. Coal Co., 238 U. S. 457, 465.

In these cases the rough material was shipped to the mills to be converted into marketable products under an arrangement by which the finished product was to be reshipped on the carrier that brought the material from the woods to its final destination for delivery to the purchaser. The rough material was not marketable, and it was essential that it should be treated at the mills before it could be disposed of. The record shows that there was no local market, and that it was known and intended that practically all of the finished product would be shipped out of the state. The interruption in the journey from the woods to final destination was merely temporary, and for the purpose of effectuating the intention at the time of shipment of selling and transporting it to another state, which the record clearly established was the paramount purpose of the shippers. This court, speaking of an analagous situation in regard to cattle in *Swift & Co.* v. *United States*, 196 U. S. 375, said at page 398:

"Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from

a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce."

The purpose of the interruption in transit was practically the same in these cases as in the case referred to in the quotation. In both cases it was for the purpose of finding a purchaser of the property. The only difference is that in these cases it was necessary to treat the rough material for the purpose of converting it into a marketable condition which necessarily involved some delay, but the length of the interruption was not material in determining the character of the shipment. It was but an incident to the main object which the record very clearly shows, as stated above, was to market the produce in another state.

In *Lusk* v. *Atkinson*, 186 S. W. 703, the Supreme Court of Missouri, after reviewing the rulings of this court, state (page 710) their effect in language which we think is worth reproducing in this connection:

"Applying the foregoing decisions to the facts in this case, the sole question presented is, What was the

'essential character' of the shipments of ties over defendant's railroad? In order to determine this question, it is important and necessary to ascertain: (1) What was the motive or intention of the shipper? (2) And what was the object and purpose to which the shipment was devoted? These two tests necessarily determine the nature of the shipment as being interstate or intrastate, and they were had in mind in each of the foregoing cases wherein the court passed upon that question.

"In the Galveston case the intention of the shipper and the object of the shipment (export) were held sufficient to show that the carriage of cotton seed cake from other localities in Texas to the wharf at Galveston, although transported under a bill of lading to the shipper's order, and although delayed at Galveston until it could be milled and ground into meal and sacked and forwarded to shipper's order, was from its initial point of delivery to the carrier a movement in interstate commerce. In one respect the shipments of the ties presents a stronger case; for in that matter the undisputed testimony shows that the great bulk of those consigned to the shipper's order from other localities in Missouri to the barge landing place at Commerce were intended after assortment to be forwarded out of the state to fill previous contracts made for their purchase, and that fact did not exist in the Galveston case,

for it was shown in that case that the buyer of cotton seed cake did not know to whom the manufactured product thereof (meal) would be sent after he had caused it to be brought to and delivered to himself at Galveston. It is evident as to the shipments from Commerce, Mo., to points outside this state the ruling in the Galveston case is clearly controlling. Equally decisive is the Worthington case, *supra*, 225 U. S. 101. That case related, as appears from the above statement of facts, to coal shipments from the interior of Ohio to its lake ports, whence the coal, or the bulk of it (for it appeared in the facts in that case that a small quantity of the coal was unloaded finally on one of the Ohio islands in Lake Erie), was intended to be trans-shipped in lake boats to some distance outside the state of Ohio, but neither the boat nor the ultimate destination were known when the coal was delivered to the initial carrier in the interior of Ohio. However, it was held that the movement in interstate commerce began at the point of delivery to the first railroad carrier, and that the state of Ohio could fix no rates governing the charges from that point to the lake port. In the case at bar it was known when the ties were purchased, and before they were delivered to the initial carrier that the bulk of them, after assortment at Commerce, Mo., to fill existing orders, would be thence transported by barge or interstate carrier outside the state. It will also be

noted that the fact that a negligible quantity of the coal was disposed of finally on one of the Ohio islands did not alter the interstate character of the great bulk of the commodity. In the case at bar the evidence shows that, except 2,500 ties remaining at Commerce, and which, as far as the evidence in this case goes, may yet be shipped abroad, and, except one carload which complainants caused to be sent to St. Louis, after filing their complaint, the entire purchase of ties made by plaintiffs in Southeast Missouri has been transported to other states and delivered to the parties who purchased it before the shipment began."

REPLY TO SOME CONTENTIONS CONTAINED IN THE BRIEFS OF THE INTERVENING CLAIMANTS.

Since preparing the above matter for the printer we have obtained a copy of the brief prepared by learned counsel. We have not time for a full review of the contentions, and confine ourselves to a few points that occur to us on reading the brief.

Counsel cite the case of Houghton v. Meyer in support of the assertion that the reversal of the decrees in these cases reversed the provision releasing the bonds, but in that case the appeal was from that part of the decree releasing and refusing to enforce the bond (see op. 208 U. S. 154), while in these cases the question as to the release was not raised by the appeals.

Conceding that the claims in Series C can not be recovered on the bond, counsel insist that said claims are recoverable against the complainants in this action on the principle of restitution. They are not in a position to invoke that principle in support of their claims in this proceeding, whatever their right might have been in other proceedings. These claimants were not parties to the original proceedings, or before the court; they came in by intervening before the master under orders entered for the enforcement of liability on the bonds. They can not change the nature of the proceedings, or

its incidents, so as to sustain a recovery on grounds that would not have entitled them to it in the first instance. This seems to be the view taken by this court in Railway Company v. McKnight, 244 U. S., p. 373. The court there held that Gallup, a shipper, did not become a party to the suit, and expressed a doubt as to the power of the court to determine the liability of complainants on the bond in the main cases.

Counsel attempt to limit the exception to the claim of the Arkadelphia Milling Company on the ground that the Railroad Commission rates were alternative and discriminatory to cases where discrimination was between those who made contracts and those who did not. It is a very narrow view to take of this exception and it is not in accordance with the view taken of it at the trial in the court below by counsel on either side or by the court.

Item 79 of the tariff, which provided for the lower rough material rates, provided that they should be conditioned upon the manufactured product being reshipped over the same line bringing in the rough material.

Paragraph (c) under said item provided that carriers would be allowed by the Railroad Commission to require consignees, in order to avail themselves of the benefit of the lower rate, to enter into a contract for the

reshipment of the rough material. (See record, pp. 17 and 18.)

There were two ways in which a shipper could obligate himself contractually to reship and thereby become entitled to the benefit of the lower rate. One was to enter into a contract in writing to be approved by the Railroad Commission; the other was to accept and act on Item 79 by availing himself of the lower rate. A shipper who did that was as much bound by contract to reship as if he had entered into a written contract with the railroad. The exception, which will be found at page 25 of the printed record, is based "on the ground that the provisions of Item No. 79 are in the alternative, and are also discriminatory against shippers who do not enter into contracts with the carrier with reference to reshipment of specific percentages of the finished product." The evident and very clear intention of this exception was to distinguish between claimants who had availed themselves of the lower rate by consenting to reship, either through a written contract or by accepting and availing themselves of the benefit of the lower rate, and those who did not. But if nothing had been said in the exception in regard to discrimination it would have been sufficient because it is based on the ground that the rates are in the alternative and that feature of the exception would cover every question that could arise under it.

The learned counsel go further in this connection, and insist that the railroads can not question the reasonableness or the validity of the Rough Material Rates, or protect themselves against a recovery of the difference between those rates and the rates actually charged, and base this contention on the ground that the reasonableness of a rate is not a judicial question. They say "whether the rates in the tariff on any shipment are unreasonable on any account is not a question that can be litigated between the carrier and the shipper. The shipper and the carrier must rely on the legislative rates fixed by the Railroad Commission, and if the courts are appealed to on the ground that any particular rates are unreasonable it must be in a proceeding against the rate-fixing power," etc. We call the attention of the court to the fact that the rates charged the claimants by the railroads on the rough material from the woods to the mill are lower than the maximum local rates provided in Items 40 and 41 of the commission tariff. (See printed record, page 24.) The maximum local rate prescribed in Items 40 and 41 must be presumed to be a reasonable rate and fix the proper standard of charge as between the carrier and shipper. The commission has no power or authority, after having fixed a maximum rate, to provide a different and lower rate, and the presumption in such cases

is that the maximum rate is reasonable. Lake Shore & Michigan R. R. Co. v. Smith, *supra*, p. 696.

But the question of reasonableness of rates is not involved in this point. We assert that the rough material rates which claimants seek to enforce are void, not because they are unreasonable, but because, first, they involve an attempt on the part of the State Railroad Commission to regulate rates on interstate commerce; and, second, because the alternative rough material rates are discriminatory in favor of one class of shippers and against other shippers, and on either or both of said grounds that the rough material rates are void on the face of the tariff and without regard to their reasonableness.

In support of their argument that the shipment of the rough material into the milling point and its subsequent transportation to points outside of the State of Arkansas did not constitute interstate commerce, counsel cite a number of tax cases decided by this court, prominent among which are: Coe v. Errol, 116 U. S. 517; General Oil Company v. Cain, 209 U. S. 211; American Steel Wire Company v. Speed, 192 U. S. 500; Brown v. Houston, 114 U. S. 622; Pittsburgh & Southern Coal Company v. Bates, 156 U. S. 577; Bacon v. Illinois, 227 U. S. 504. The distinction to be drawn between those taxing cases and transportation cases, such as are here involved, has been pointed out and well rec-

ognized by this court since the case of Woodruff v. Parham, 8 Wall. 123. In discussing Woodruff v. Parham, we desire to point out that the charter of Mobile authorized that city to impose a tax for municipal purposes on real and personal estate, auction sales and sales of merchandise, etc. Woodruff as auctioneer and commission merchant had sold a large amount of goods for others and on his own account, and insisted that since the goods were brought in from other states and sold in original packages he was not liable to the tax imposed by the city ordinances upon sales of merchandise. In discussing and in sustaining the tax the court say:

"The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another state, and whether the goods sold are the produce of that state or some other. There is no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the states or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and, therefore, void. There is also, in addition to the restraints which those provisions impose by their own force on the states, the unquestioned power of Congress, under the authority to regulate commerce among the states, to interpose, by the exercise of this power, in such a manner as to prevent the state from any oppressive interference with the free interchange of commodities by the citizens of one state with those of another."

In Brown v. Houston, it will be noted that Brown was in the coal business in Pittsburgh, Pennsylvania, and engaged in shipping coal to New Orleans. The coal was assessed for taxation while afloat in the Mississippi river in the original condition in which it was exported from Pennsylvania. The tax on the coal had been paid in Pennsylvania. From a transportation standpoint the coal was clearly interstate commerce, but for the purpose of taxation it was treated as a part of the general mass of property of the state of Louisiana. It was taxed in common with all property found within the state and the tax was sustained.

Pittsburgh & Southern Coal Company v. Bates is another coal case. There the coal company was carrying on business in Pittsburgh, Pennsylvania, and was shipping coal down the Mississippi river to Louisiana points. Part of the coal taxed was in vessels, being about one hundred in number, which as a matter of convenience had been stopped and moored in the Mississippi river about nine miles above the port of Baton Rouge. In other words, the coal had been stopped before reaching its final destination. Clearly, from a transportation standpoint, the coal was moving in interstate commerce. However, for taxation purposes, the court held that it had become incorporated into the bulk of the property of the State of Louisiana and

therefore taxable. In discussing the question the court use the following language:

"The decision of the court in Brown v. Houston seems to be conclusive of the case now before the court. The property in this case, as in that, still belongs to the original owners in Pennsylvania, but is brought on the navigable waters of the United States, in boats and barges to Louisiana for the purposes of sale, and is subject to taxation and sale as any other property of the citizens of the United States is subject when it becomes incorporated into the bulk of the property of the country, unless there be some special exemption set forth why it should not be thus taxed and sold, of which there is none here."

Bacon v. Illinois. Bacon owned a grain elevator in South Town, city of Chicago. Shipments of grain made by different parties in the western states destined to eastern markets were purchased by Bacon after they were shipped and the bills-of-lading were assigned to him and he enjoyed the transit privileges of putting the grain in his elevator for the purpose of cleaning, inspecting, weighing, clipping, drying, sacking, grading and mixing. After this was done the grain was shipped to the destination as indicated in the original bill-of-lading. The grain was at rest in the state of Illinois, and for taxing purposes became a part of the property of that state. The sole question decided was whether the grain was *in transit* in interstate commerce. It is not determined in that case whether the grain constituted *interstate commerce*. The only thing

the court decided was that it was not *in transit* in interstate commerce so as to relieve it from taxation. In discussing the question the court say:

"He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way without discrimination."

The court calls special attention to the proposition that it is not a question as to the extent of the power of Congress to regulate interstate commerce, but whether the particular exercise of state powers in conflict with the paramount authority.

"The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority. Thus, goods within the state may be made the subject of a nondiscriminatory tax though brought from another state, and held by the consignee for sale in the original packages."

The distinction pointed out in the above cases is very clearly stated in the case of American Steel & Wire Company v. Speed. In discussing the precise question the court employs the following language:

"Woodruff v. Parham and Brown v. Houston on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but deter-

mined whether a particular exertion of that power by a state so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in Brown v. Maryland—that is, sale in the original packages at the point of destination—was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution although its levy might remotely and indirectly affect interstate commerce. In Leisy v. Hardin and Lyng v. Michigan the same question in a different aspect was presented. The goods had reached their destination and the question was not the power of the state to tax them, but its authority to treat the goods as not the subjects of interstate commerce and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense, and, therefore, void. The cases, therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purposes of interstate commerce. But both cases, whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular exertion of state authority considered in the respective cases."

General Oil Company v. Crain cites and approves the rule in American Steel & Wire Company v. Speed above quoted.

Counsel refer to the cases of McCluskey, Admr., v. M. & N. Ry. Co. *et al.*, 243 U. S. 36. To demonstrate the distinction between that case and the cases at bar it is only necessary to call attention to the facts involved in that case. It was a suit for damages brought under the Employers' Liability Act to recover damages resulting from injuries suffered by Nordgard while in the employ of the defendant railway company. The defendant, Stimson Mill Company, was engaged in the logging and lumber business and carried its logs on its own logging road, the Marysville & Northern Railway, from timber land owned by it in Washington to a point near Marysville in that state, where they were dumped into Puget Sound. Part of the logs were thereafter sold to mills located on the Sound and they were taken away by the purchasers to their mills or places of storage and subsequently resold for piling or poles to purchasers both within and without the state. The rest of the logs were rafted and taken by tugs to the Stimson Company's mill at Ballard, Washington, where they were manufactured into lumber, which was thereafter sold, about 20 per cent in local markets and the remainder shipped upon orders either by rail or boat to various points in the state of Washington and other states and countries. 211 Fed. 722. In discussing the movement of the logs over the railroad into Puget Sound the court said: "There was no initial

shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment. There was no contract of carriage; there was no bill-of-lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant mill company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or carry them further". 218 Fed. 740.

Respectfully submitted,

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